

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ANTHONY M. KISSLING & SUZANNE R.)	
KISSLING,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 19857-10.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
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ORDER

This case was on the Court's November 14, 2011 trial calendar for Buffalo, New York but is now set for trial at a special session in August. The Commissioner recently filed three motions *in limine* that the Court discussed with the parties in a phone call on July 22, 2015.

Motion to View the Properties

This case has only one issue -- the value of conservation easements -- and the first motion is to have the Court visit the properties to see what they look like, which might help in placing later testimony in context. The Kisslings don't object and the general rule is that judges in a bench trial may view the property -- the viewing is a form of evidence -- as long as both counsel attend. *See, e.g., Interco, Inc. v. United States*, 1980 U.S. Ct. Cl. LEXIS 1022; 80-1 U.S. Tax Cas. (CCH) para. 9346; *see also Snyder v. Massachusetts*, 291 U.S. 97, 121 (1934). The Court thinks a viewing is especially useful in this case -- the judge trying the case is a native of the area and is wary of letting his general knowledge displace the specifics of the building and neighborhood at issue.

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Any disagreements on the timing, conditions, or scope of the visit will be worked out informally in consultation with counsel.

Motion to Exclude Mahoney Report

The Commissioner's second motion would exclude the expert-witness report of Kevin Mahoney. Mahoney is a construction consultant who focuses on the Western New York market. The Kisslings want him to testify on the costs of maintaining the subject properties with the conservation easements in place. Those easements are in favor of the National Architectural Trust, and one of the Kisslings' theories in support of their position is that the Trust is more likely to enforce them than the City of Buffalo is likely to enforce its historic-preservation rules. This is an argument that the Court has taken seriously. *See Simmons v. Commissioner*, 98 T.C.M (CCH) 211, 217 (2009). It would therefore be "helpful" in valuing the subject properties if the Court adopted the Kisslings' theory that the costs of maintaining the properties affects the income stream from them, which in turn affects their "after" value (i.e., their value after the grant of the easements). (Federal Rule of Evidence 702 makes "helpfulness" in deciding an issue a criterion of admissibility.)

The Commissioner also objects to Mahoney's report because, he claims, Mahoney is only a "conduit" for the opinions that others have about Buffalo's ability and willingness to enforce preservation rules as vigorously as a private-sector easement holder. The Kisslings argue that Mahoney's opinions on this matter are his own but that his opinion on this subissue is naturally affected by those of other people in the industry. Providing the names of some of these people does not make him a "conduit" for others' opinions, the Kisslings argue, but only goes to prove his thoroughness in describing the "facts or data" that he considered. *See Tax Court Rules of Practice and Procedure 143(g)(1)*.

The Kisslings also represent that Mahoney will be testifying from personal knowledge about the practical effects of Buffalo's historic-preservation laws on the costs of maintaining the subject properties, and not about the meaning of those laws. Mahoney's report, already lodged with the Court under the pretrial order, supports this contention. The Court will deny this motion.

Motion to Exclude Barenholtz Report

The Commissioner also moves to exclude the expert-witness report of Jan Barenholtz, who is the Kisslings' expert on valuation. The Commissioner says this

report violates Rule 143(g)(1), Tax Court Rules of Practice and Procedure, because it is insufficiently detailed, does not set out the data or facts that Barenholtz relies on, and does not explain the basis for his opinion.

The Court's review of this report shows that this is not true. Part of the report is Barenholtz's appraisal of the "before" value of the properties using the income approach. The Court may or may not ultimately find it persuasive, but even the Commissioner notes that it is one of the generally accepted ways to appraise rental properties. We might also agree with the Commissioner that Barenholtz's 2004 estimation of the properties' "after" value -- which was then (when the case was still before IRS examination) based on reports of percentage reductions in value in other cases -- was not "helpful," but Barenholtz then did a more detailed analysis in 2007. That addendum is part of his present report. Maybe the Commissioner is right that this addendum is little more than a *post hoc* rationalization; maybe the Kisslings are right that if Barenholtz finds a discount -- after doing a property-specific analysis -- that falls in the range of discounts established in other cases it only strengthens his conclusion.

But that dispute must await trial on the merits: The report as it *now* stands meets the criteria of Rule 143(g), Tax Court Rules of Practice and Procedure.

To sum up, it is

ORDERED that respondent's July 15, 2015 motion *in limine* to request a viewing by the judge is granted. It is also

ORDERED that respondent's July 14, 2015 motion *in limine* to exclude the report of Kevin Mahoney is denied. It is also

ORDERED that respondent's July 14, 2015 motion *in limine* to exclude the report of Jan Barenholtz is denied.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
July 23, 2015